

THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE
INTERNATIONAL SALE OF GOODS (“CISG”), LECTURE II:
ISSUES COVERED AND KEY SUBSTANTIVE PROVISIONS

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I. **Issues covered** by and excluded from the CISG; continuing relevance of law applicable under principles of **private international law**.

A. As is noted in Lecture I, the CISG contains substantive law governing the rights of parties to certain international sales contracts – “international private law” –, and it deals with issues such as the formation of a contract for sale, the seller’s delivery obligations, the quality of goods the seller must provide, the buyer’s obligation to pay, remedies for breach, and exemption from liability based on unforeseen circumstances (*force majeure*).

B. The Convention does not, however, attempt to address every legal issue that can arise in connection with international sales transactions – it leaves a number of such issues to be governed by applicable (usually domestic) law.

1. According to Article 4, the CISG “governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.”

2. Explicitly excluded from the Convention are issues of “the validity of the contract or of any of its provisions or of any usage” (Article 4(a), emphasis added). Thus mandatory rules of applicable domestic law – such as rules governing capacity to contract, agency, unenforceability due to unconscionability or unfairness, and the like – remain applicable to transactions governed by the CISG.

3. Also explicitly excluded are matters relating to “the effect which the contract may have on the property in the goods sold” (Article 4(b)), emphasis added). Such issues of property in (or “title” to) the goods remain governed by applicable (presumably domestic) law.

4. As is noted in Lecture I, “the liability of the seller for death or personal injury caused by the goods” is also beyond the scope of the Convention (Article 5), and remains subject to applicable non-CISG law.

a. This is related to the Convention’s attempt to stay out the controversial area of consumer protection by excluding consumer sales (Article 2(a)).

C. Even for matters within the Convention's coverage it was impossible to expressly provide for every issue that might arise: so-called internal gaps – issues on subjects covered by the CISG but not explicitly addressed therein – “are to be settled in conformity with the general principles on which [the CISG] is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law” (Article 7(2)).

D. In short, even when the Convention governs a transaction, non-Convention law continues to govern in a number of situations.

II. **Party autonomy**; the Convention's approach to determining the parties' **agreement**.

A. As is noted in Lecture I, party autonomy is a fundamental principle of the Convention: with only the narrowest of exceptions, the parties can, by agreement, derogate from or vary the effect of any rules of the CISG, and indeed can exclude the Convention's application entirely in favor of other law (Article 6).

B. The Convention takes a fairly liberal view of the parties' agreement:

1. The Convention generally adopts a “reasonable person” (objective) standard for determining the meaning of the parties' statements and conduct (Article 8(2)), except where one party “knew or could not have been unaware” of the actual (subjective) intent of the other party (Article 8(1)). Whichever of these standards applies, the Convention requires “due consideration “ of “all relevant circumstances of the case, including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties” (Article 8(3)).

2. The parties are bound by practices they have established between themselves, and by usages to which they have agreed (Article 9(1)). Agreement to an international trade usage is presumed if the parties “knew or ought to have known” of the usage and the usage is “widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned” (Article 9(2)).

III. CISG rules on **contract formation**.

A. Part II of the Convention (Articles 14-24) contains rules governing contract formation (“concluding” a contract, in CISG terminology) by means of offer and acceptance. These include provisions defining an offer (Article 14) and an acceptance of an offer (Article 18), as well as provisions addressing withdrawal of an offer (Article 15), revocation of an offer and irrevocable offers

(Article 16), and the effect of rejecting an offer (Article 17).

B. Nothing in the Convention requires an offer, an acceptance, or any other communication during the contract formation process to be in writing or in other specified form.

1. This is consistent with the general “informality” principle of Article 11, which states that “[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form,” and that the contract “may be proved by any means, including witnesses.”

2. Caveat: Pursuant to Article 96 a Contracting State may declare that CISG provisions which eliminate written-form requirements do not apply if a party to the contract “has his place of business in that State”; several States have made such a declaration, and the article specifying its effect (Article 12) is the only one expressly identified in Article 6 as beyond the party’s autonomous power to derogate from or vary the effect of provisions of the Convention.

C. Of particular interest is the Convention’s provision dealing with a reply to an offer that “purports to be an acceptance but contains additions, limitations or other modifications” (Article 19).

1. Such a reply varying the terms of the offer is generally deemed “a rejection of the offer and constitutes a counter-offer” (Article 19(1)) unless the variations are “immaterial” (see Article 19(3) for what terms are “material”), in which case the response can conclude a contract (Article 19(2)).

2. The situation where a reply varies the terms of an offer arises frequently when one or both parties have employed their “standard terms” (the “battle of the forms”); there is controversy concerning how the Convention should be applied in such situations.

a. For example, some argue that Article 19 and the CISG’s other contract formation rules apply directly to determine if and when a contract was concluded and whether standard terms are incorporated; others argue that, because the CISG contains nothing explicitly addressing use of standard terms, the matter must be resolved in a different fashion.

IV. The **performance obligations** of the parties.

A. Part III Chapter II of the Convention contains provisions establishing and elaborating on the seller’s obligation to deliver the goods, including provisions

that address the place of delivery (Article 31), use of a third-party carrier (Article 32), the time of delivery (Article 33), and handing over documents covering the goods (Article 34). All such provisions can be derogated from or varied by the agreement of the parties.

1. The provisions governing the seller's obligations with respect to "conformity of goods and third party claims" (Articles 35-44) are among the most important and heavily-litigated in the CISG.

a. Article 35 governs the seller's obligations as to the quantity, quality, description and packaging of the goods – particularly crucial matters – and looks fundamentally to the parties' agreement to define those obligations (Article 35(1)).

b. Article 35(2), however, specifies certain implied or assumed obligations concerning conforming goods to which the seller is subject even without affirmative agreement (although, as usual, the parties can agree to derogate from or vary these obligations): unless otherwise agreed, the seller is obliged to deliver goods that (a) are fit for their ordinary purposes; (b) are fit for particular purposes of the buyer that were made known to the seller by the time the contract was concluded; (c) conform to samples or models shown by the seller; and (d) are packaged in the "usual" manner, or a manner adequate to preserve and protect them.

i. These implied or assumed obligations have raised important issues, such as whether they require a seller to deliver goods that comply with domestic health, packaging and labeling regulations of the buyer's jurisdiction even without an express undertaking by the seller to do so.

2. The Convention also imposes on the seller obligations to deliver goods that are free from claims by third parties (a) to ownership of the goods (Article 41), and (b) for infringement of intellectual or industrial property rights (Article 42). The latter obligation, of course, is of growing significance in modern commerce.

3. The Convention imposes on the buyer extremely important obligations to examine the goods upon delivery (Article 38), and to give the seller notice if buyer claims that the delivered goods either did not conform to the requirements of the contract (Article 39) or were subject to third-party claims that violated the seller's obligations (Article 43). The buyer is generally required to give such notice within a "reasonable time" from when it discovered or should have discovered the grounds for the claim; however, buyers generally *must* give notice of a claimed lack of

conformity within two years after delivery, whether or not the lack of conformity was discoverable within that period (Article 39(2)).

a. Failure to comply with these notice requirements in a timely fashion and with sufficiently specific information strips the buyer of its claims (although the Convention contains several provisions that ameliorate these consequences in particular circumstances – see Articles 40, 43(2) and 44).

b. Because of the severe consequences attached to a failure to give proper notice, and because the examination and notice provisions employ necessarily vague standards (e.g., “reasonable time”), they have been among the most frequently-litigated provisions of the CISG.

B. Provisions in Part III Chapter III of the CISG establish and elaborate on the buyer’s obligation to take delivery and pay the price, including provisions that address the place of payment (Article 57), the time of payment (Article 58), elimination of requirements for formal payment demands (Article 59), and compliance with government regulations governing payment (Article 54). Again, all such provisions can be derogated from or varied by the agreement of the parties.

V. **Risk of loss.**

A. Part III Chapter IV (Articles 66-70) (“Passing of Risk”) contains rules governing the time when financial responsibility for damaged or destroyed goods passes from the seller to the buyer. This Chapter contains three basic risk provisions: Article 67 applies when the goods are transported by a third-party carrier and the seller has not agreed to responsibility for their arrival at their destination; Article 68 comes into play when the goods are sold while they are already in transit; Article 69 governs in situations not covered by Articles 67 or 68. These provisions generally reflect the features of domestic risk of loss regimes around the globe.

B. As usual, the parties can derogate from or vary the effect of these provisions – e.g., by agreeing to particular price-delivery terms (such as “CIF” or “FOB”) which establish the time of passing of risk. Indeed, the risk of loss provisions of the Convention work in tandem with such terms, and price-delivery terms (particularly those defined in the International Chamber of Commerce’s INCOTERMS) have frequently been employed in transactions governed by the Convention.

C. Article 70 makes clear that, if the seller has committed a fundamental breach of contract (defined in Article 25), a buyer who would normally bear risk may be able to avoid the contract and thereby escape the duty to pay for lost,

damaged or destroyed goods (Avoidance of contract is discussed below in connection with remedies.)

VI. **Remedies:** The remedy provisions of the Convention combine the approaches of both the Civil Law and the Common Law systems, thus affording aggrieved parties a diverse menu of remedial options.

A. The Convention grants both aggrieved buyers and aggrieved sellers very broad rights to require the breaching party to perform its contractual duties – see Articles 46 and 62.

1. Where the seller has delivered non-conforming goods, the buyer's rights specifically include the right to require the seller to repair the goods (provided this is "reasonable") or, if the non-conformity constitutes a fundamental breach of contract, to require the seller to deliver conforming substitute goods. (Fundamental breach is discussed below in connection with avoidance of contract.)

2. A seller who recovers the price for goods is also entitled to interest under Article 78.

3. To overcome objections by Common Law States, which generally restrict the availability of "specific performance" remedies aimed at requiring actual performance (as opposed to damage remedies designed to substitute for performance), Article 28 of the CISG states that a court need not order specific performance "unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."

a. Thus the extent to which the remedial right to require performance is available under the CISG will vary with the domestic law of a court hearing a dispute.

b. In practice, this difference has not caused significant problems, and it appears that Article 28 has seldom been invoked in litigation.

B. As an alternative to requiring performance, an aggrieved party can recover damages for breach. Damages are financial compensation that, under the CISG, is designed to put the aggrieved party into the position it would have been in had the contract not been breached.

1. For example, a seller that delivers late or delivers non-conforming goods is liable in damages for "a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach" (Article 74).

- a. A buyer that has received non-conforming goods can, as an alternative to damages, reduce the price in proportion to the decreased value of the non-conforming goods (Article 50).
 - b. This remedy is based on the Civil Law doctrine *Actio Quanti Minoris*.
 2. Damages recoverable under the Convention are limited to compensation for losses foreseeable to the breaching party when the contract was concluded (Article 74) that could not have been mitigated through reasonable measures by the aggrieved party (Article 77).
 3. An aggrieved buyer or seller that properly avoids the contract (discussed below) can also recover damages.
- C. In certain circumstances, an aggrieved buyer or seller can “avoid the contract” and thereby eliminate the parties’ obligations to exchange the goods and the price, by notifying the breaching party of the intent to avoid (Article 26).
1. Avoidance “releases both parties from their obligations” under the contract (except for obligations applicable upon breach, such as an obligation to arbitrate disputes or to pay liquidated damages), and entitles each to restitution of what it has “supplied or paid under the contract” (Article 81).
 2. Upon avoidance, the aggrieved party is also entitled to damages. To compensate the avoiding party for the lost exchange, damages are measured by the difference between the contract price and either the price in a reasonable substitute transaction (Article 75) or the current (market) price for the goods involved (Article 76); in addition, an avoiding party can recover any additional foreseeable and non-mitigable consequential damages caused by the breach (Article 74).
 - a. The Convention also provides for partial avoidance of contract, which in certain circumstances permits an aggrieved party to preserve the purchase-and-sale obligation with respect to some of the goods while eliminating the obligation for the balance. See Articles 51 and 73.
 3. In general, an aggrieved party has the right to avoid only if the breach it has suffered constitutes a “fundamental breach” of contract (Article 49(1)(a) and 64(1)(a)).
 - a. The definition of fundamental breach in Article 25 is complex, but focuses on a breach that “results in such detriment to

the other party as substantially to deprive him of what he is entitled to expect under the contract,” in contrast to a breach that does not have a substantial negative impact on the expectations of the aggrieved party. In other words, only a serious breach justifies the drastic remedy of avoidance of contract.

i. In case of a breach that does not qualify as “fundamental,” the aggrieved party is entitled to remedies other than avoidance of contract.

b. The only situation in which an aggrieved party need not establish a fundamental breach in order to qualify for the right to avoid the contract is when, pursuant to Article 47 or Article 63, it has given the breaching party an extra period of “reasonable length” to perform its basic obligations (i.e., for the seller to deliver, or for the buyer to take delivery and/or pay the price) and the breaching party has not met this deadline (Articles 47(1)(b) or 63(1)(b)).

i. This procedure for establishing a deadline for performance after which a breach will justify avoidance of contract is based on the German domestic “*Nachfrist*” doctrine, and is frequently referred to as “*Nachfrist*” in CISG commentary.

4. The Convention also provides a procedure for avoiding the contract if a future fundamental breach has merely been threatened, provided the threat makes it “clear” that the fundamental breach will occur (Article 72).

a. Alternatively, the CISG provides a procedure by which a party can (temporarily) “suspend” its performance if “it becomes apparent that the other party will not perform a substantial part of his obligations” (Article 71).

VII. **Exemption.**

A. CISG Article 79 provides that a breaching party is exempt from liability for damages if its failure to perform was caused by an “impediment” that meets specified requirements.

1. This provision is in the nature of a *force majeure* doctrine (indeed, Article 7.1.7 of the UNIDROIT Principles of International Commercial Contracts, which repeats CISG Article 79 almost verbatim, is entitled “*Force Majeure*”).

2. Although distinct in its formulation and terminology, Article 79 has been applied in a fashion consistent with traditional *Force Majeure* analysis to determine whether a party assumed the risk of a post-contract occurrence that has rendered its performance significantly more difficult than anticipated.

VIII. **Conclusion:**

a. The substantive provisions of the CISG, while certainly not perfect, have proven to be a sophisticated and effective system for regulating international sales, incorporating the experience and insights of the world's various legal systems and well adapted to meet the quickly-evolving challenges of global trade.

b. As a result, the CISG has been successful in meeting the formidable challenges of its purposes – providing a uniform international sales regime that reduces transaction costs by ameliorating choice of law issues, and thereby promoting global commerce.
